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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONSBANK OF NORTH CAROLINA, N.A., *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, *et al.*,
Respondent.

EUGENE LUDWIG, COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE COMPANY, *et al.*,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This brief is submitted on behalf of the American Land Title Association ("ALTA") with the written consent of counsel to all parties. Copies of such consent have been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

The Federal Petitioners and the NationsBank Petitioners urged this Court in their certiorari petitions to grant review based upon their conclusion that there was a conflict in the circuits over whether Section 92 of the National Bank Act, 12 U.S.C. § 92 (Supp. V 1993), constitutes a limitation on the insurance activities of national banks that the Comptroller of the Currency may authorize under the incidental powers provision of 12 U.S.C. § 24 Seventh (Supp. V 1993). Petitioners contrasted the decision below and the Second Circuit's decision in *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), *cert. denied sub nom. Ludwig v. American Land Title Ass'n*, 113 S. Ct. 2959 (1993) ("*ALTA v. Clarke*") on the one hand, and the D.C. Circuit's decision in *Independent Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980) ("*Heimann*"), on the other.[1]

Despite the importance of *ALTA v. Clarke* to their petitions, none of the petitioners or their many *amici* even mentions the case in their merits briefs. The omission is not surprising, since the petitioners apparently hope that, if the Court reverses the decision below, its opinion might inadvertently sweep in title insurance and reverse the Second Circuit's decision as well.

ALTA is a voluntary, non-profit incorporated trade association representing the Nation's land title industry. Organized under the laws of the District of Columbia, ALTA has approximately 2,300 members, including title insurance agents and title insurance companies doing business in all 50 states.

Title insurance is the business of insuring the interests in real property of owners, leaseholders, lenders, and others. Title insurance policies can only be issued on the

[1] *See, e.g.*, Federal Petitioners Br. at 18-19; NationsBank Petitioners Br. at 22-24.

basis of a search and examination of the records and documents that establish or give notice of the rights, liens, claims and encumbrances that may exist with respect to the property. Because most real estate records are maintained at the local level, title insurance policies are typically issued at the local level, frequently by title insurance agents. These agents are generally responsible for the search and examination of the underlying title information, the determination (pursuant to underwriting guidelines established by the title insurance company) whether particular matters must be excepted from policy coverage or may be insured against, and for the issuance of the policies on behalf of the title insurance companies they represent.

On matters of common concern to the title insurance industry and its consumers, ALTA represents its members before courts, agencies, and the Congress. ALTA has participated as *amicus curiae* in this Court where the matter is likely to have a significant influence on the title insurance industry.[2] ALTA files this brief because of the potential that a reversal of the decision below might affect the finality of its own litigation against the Office of the Comptroller of the Currency ("OCC").

In 1986, the OCC issued an interpretive ruling that a national bank may act as an agent in the sale of title insurance in any community regardless of population if such activities are undertaken in transactions involving the bank's loans.[3] Based on this ruling, in 1989 the OCC

[2] *See, e.g., United States v. 92 Buena Vista Avenue, Rumson, N.J.*, 113 S. Ct. 1126 (1993); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *United States v. Mottaz*, 476 U.S. 834 (1986); *Oneida County, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985); *United States v. Dann*, 470 U.S. 39 (1985).

[3] OCC Staff Interpretive Letter No. 368, *reprinted in* [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538 (July 11, 1986).

approved the establishment by Chase Manhattan Bank of two operating subsidiaries with authority to issue title insurance in transactions involving residential and commercial mortgage loans. Prior to the OCC ruling, there was no evidence that national banks had ever engaged in the title insurance agency business.

ALTA filed suit against the OCC, urging that the OCC's ruling and approval be set aside as unlawful because it permitted a national bank to engage in title insurance agency activities that are (a) prohibited to them by 12 U.S.C. § 92 and (b) not authorized by 12 U.S.C. § 24 Seventh or any other provision of law. While ALTA lost on a motion to dismiss in the trial court, a unanimous panel of the Second Circuit reversed.

The Second Circuit concluded that the language and legislative history of 12 U.S.C. § 92 supported the finding that national banks were precluded from acting as insurance agents outside the provision's geographical restrictions. *ALTA v. Clarke*, 968 F.2d at 155-56. The court also rejected the OCC's alternative contention that title insurance, like credit life insurance in *Heimann*, was a " 'special' " type of insurance that fell outside Section 92's limits on national bank activity. 968 F.2d at 156-57. This Court denied certiorari.

Because the interpretation of Section 92 in this case may affect the title insurance industry as well, ALTA has a strong interest in the proper resolution of this case. ALTA seeks to demonstrate that the legislative history of Section 92 reveals that the only possible interpretation of the introductory language of the section is that Comptroller Williams (who drafted the language) and Congress were intending to make clear that the limited insurance agency powers granted by Section 92 were the sole insurance agency powers authorized for national banks. ALTA also seeks to show that petitioners' broad framework for determining when activities are "incidental" to "the business of banking" is contrary to the historical

jurisprudence in this area. Finally, ALTA files this brief to demonstrate that an affirmance of the decision below will not necessarily jeopardize the ability of national banks to continue to engage in credit-related insurance activities (such as credit life insurance) that the courts have found to be uniquely related to the business of banking in fundamental ways that are not shared by other kinds of insurance products, such as automobile, homeowners, and title insurance, or annuities.

SUMMARY OF ARGUMENT

1. Petitioners and their *amici* contend that Section 92 was an additional grant of insurance agency powers to small town banks that was not intended to limit those insurance agency powers that were provided to all national banks by the incidental powers provision of 12 U.S.C. § 24 Seventh, which was enacted some 50 years earlier. They claim that this interpretation is compelled by the introductory language to Section 92 ("In addition to the powers now vested by law in national banking associations under the laws of the United States . . ."). The legislative history clearly demonstrates, however, that this language reflects Congress' intent that Section 92 was the only authority for national banks to engage in insurance agency activities.

Section 92 was adopted on the recommendation of the Comptroller of the Currency, who drafted the provision and who laid out the reasons for its enactment in a letter to the chairmen of the House and Senate banking committees. This letter was reproduced in its entirety in the 1916 Congressional Record and is set forth in the Appendix to this brief. While the Comptroller indicated that it would be desirable to allow small town banks to realize additional revenue through the sale of insurance products, his letter made clear that under existing law "[n]ational banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies . . . ." App. at 3a. (This conclusion was

echoed in a memorandum published earlier in 1916 by the Federal Reserve Board.) After reviewing Supreme Court jurisprudence on the powers of national banks, he concluded that "[i]t is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." *Id.* On the basis of this letter and recommendation, Congress enacted Section 92 without further substantive debate.

In light of the conclusions so clearly communicated to Congress by the Comptroller who drafted Section 92, it is impossible to read the introductory language to the section in the manner suggested by petitioners and their *amici.* To do so implies that the intent of the language was to preserve powers that neither the Comptroller nor the Congress believed to exist. Rather, the only possible interpretation is that the phrase ("[i]n addition to the powers *now* vested by law") was intended to emphasize that, as of 1916, no other provision of law (including the incidental powers provision) vested any insurance agency powers in national banks. Accordingly, the court below and the Second Circuit in *ALTA v. Clarke* correctly concluded that Section 92 was intended by Congress to be the exclusive grant of insurance agency powers for national banks.

2. Fundamental principles derived from the historical jurisprudence on national bank powers should guide the Court's determination of the proper scope of the incidental powers of national banks. That jurisprudence demonstrates that the incidental powers provision of 12 U.S.C. § 24 Seventh does not restrict national banks to the business of banking as it existed in the nineteenth century. On the other hand, the jurisprudence also demonstrates that the provision does not permit national banks to engage in business or commercial activities that have not been authorized by Congress merely because they may have some nexus to the "business of banking."

Between these two extremes, there is an intermediate view that not only harmonizes and explains the 130-year jurisprudence in this area, but provides · principled approach to the incidental powers provision that would provide national banks with the flexibility to meet the needs of the modern era in performing the very old "business of banking." This analysis was presented in Professor Edward L. Symons' insightful article, *The "Business of Banking" in Historical Perspective,* 51 Geo. Wash. L. Rev. 676 (1983). While all of the briefs filed by petitioners and their *amici* cite Professor Symons' article for various propositions, none of them discusses the fundamental principles he derives from his comprehensive analysis of the statute and case law.

As discussed in Part II below, a review of the relevant jurisprudence demonstrates that the courts have upheld activities as incidental to "the business of banking" when the activity (1) is a form of, or functionally equivalent to, deposit taking, credit granting, or credit exchanging activities (*i.e.*, activities that constitute the "business of banking,") or is reasonably necessary to enable banks to perform those activities more efficiently or effectively, and (2) does not expose banks to risks of a non-banking nature, such as those of a commercial business enterprise. On the other hand, activities that do not meet these standards have consistently been rejected by the courts.

ALTA submits that this is the standard that should be applied by the Court in determining the proper scope of the incidental powers of national banks.

3. In addition to the Fifth Circuit's decision on annuities, federal appellate courts have addressed the insurance agency powers of national banks in three other contexts. In *Saxon v. Georgia Ass'n of Indep. Ins. Agents,* 399 F.2d 1010 (5th Cir. 1968), the court held that Section 92 precluded national banks in places with a population over 5,000 from engaging in the insurance agency business in connection with automobile, home-

owners, and other forms of property and casualty insurance issued in connection with loans made by the bank. In *ALTA v. Clarke*, the Second Circuit reached the same conclusions with respect to title insurance. However, in *Heimann*, the D.C. Circuit concluded that Section 92 did not prohibit national banks from selling credit-related forms of insurance, such as credit life insurance, to their borrowers.[4]

Petitioners' *amici* are concerned that if the Court concludes that Section 92 limits the insurance agency activities of national banks, as the Fifth and Second Circuits have found, the continued ability of national banks to sell credit-related forms of insurance without express Congressional authorization would be jeopardized. However, in upholding the analysis of Section 92 reached by the Fifth and Second Circuits, the Court does not necessarily have to overturn the conclusions of the D.C. Circuit in *Heimann*.

There are fundamental and unique characteristics of credit life insurance and its use by banks that do not pertain to other kinds of insurance, such as automobile, homeowners, and title insurance, that may be purchased in connection with loan transactions, or to annuities. Credit life insurance is sold only in credit transactions; it exists solely to protect credit grantors and would not be available unless credit grantors sold it; national banks were almost universally involved in the sale of such insurance at the time of the *Heimann* decision; and the bank, in performing the ministerial activities of enrolling borrowers in its credit life insurance program, does not

[4] Credit-related insurance provides that the insurer will pay to the bank, in whole or in part, the outstanding balance of the loan in the event the borrower dies (credit life insurance), becomes disabled (credit disability insurance), is seriously injured in an accident (credit accident insurance), or becomes unemployed (involuntary unemployment insurance). For convenience, the various forms of credit-related insurance will be collectively referred to as "credit life insurance."

undertake the functions and activities normally performed by an insurance agent.

These characteristics were identified by the Comptroller in promulgating the credit life insurance regulations that were at issue in *Heimann*. They explain why the D.C. Circuit concluded that credit life insurance was "unlike other forms of insurance," 613 F.2d at 1170, and why the Second Circuit concluded that the credit life insurance precedent was not relevant to deciding whether Section 92 limited the title insurance agency activities of national banks. *ALTA v. Clarke*, 968 F.2d at 270.

Accordingly, in addressing the incidental to banking and Section 92 issues in this case, the Court should recognize the limited relevance of the credit life insurance precedent. There is ample reason and basis to distinguish the sale of credit-related insurance from the agency activities involved in other kinds of insurance products, such as those at issue in *Saxon*, in *ALTA v. Clarke*, and in this case.

ARGUMENT

I. SECTION 92 OF THE NATIONAL BANK ACT CONSTITUTES AN IMPLIED LIMITATION ON THE INSURANCE ACTIVITIES OF NATIONAL BANKS

In support of their contention that Section 92 imposes no limitations on the insurance activities that the Comptroller may authorize for national banks under the "incidental" powers provision of 12 U.S.C. § 24 Seventh, petitioners and their *amici* lay heavy emphasis on the initial twenty words of the provision ("In addition to the powers now vested by law in national banking associations under the laws of the United States . . . .").[5] The NationsBank Petitioners contend that the initial three words "conclusively demonstrate[]" that Section 92 was not intended as

[5] *See* Federal Petitioners Br. at 39-40; NationsBank Petitioners Br. at 37-40; ABA Br. at 7-10; New York Clearing House Association Br. at 27-28; Conference of State Bank Supervisors Br. at 24-25.

a limitation on insurance activities that fall within the incidental powers clause, NationsBank Petitioners Br. at 37, and the Federal Petitioners suggest that this language can only mean that those lawful powers of national banks that "pre-date" Section 92 were intended by Congress to "survive" Section 92. Federal Petitioners Br. at 40.

If, at the time Section 92 was enacted in 1916, the Comptroller had previously determined that national banks could engage in certain kinds of insurance agency activities under Section 24 Seventh, and Congress was aware of that determination, petitioners' interpretation of the "in addition to" language would be compelling. Indeed, the "in addition to" language would have been needed so as to avoid any negative implication that the new powers for small town banks were intended to be in derogation of those insurance powers that the Comptroller had previously determined were enjoyed by all national banks under Section 24 Seventh.

Ultimately, it is Congress' understanding of what it was enacting that must guide the interpretation of this language. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982).[6] In discerning this understanding, the Court "'necessarily attach[es] 'great weight' to agency representations to Congress'" when the agency drafted the provision at issue and made its views directly known to the Congress. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 788 (1985) (quoting from *United States v. Vogel Fertilizer Corp.*, 455 U.S. 16, 31 (1982), in turn quoting *Zuber v. Allen*, 396 U.S. 168, 192 (1969)). The Court has repeatedly emphasized the importance of the contemporaneous views expressed to Congress by an

[6] *See also Platt v. Union Pac. R.R.*, 99 U.S. 48, 64 (1879) ("[I]n endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.").

agency that has drafted or participated in the drafting of legislation in determining Congress' understanding of what it was enacting. *See Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 850 (1984); *Miller v. Youakim*, 440 U.S. 125, 144 (1979); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 549 (1940). *See also* 2A N. Singer, *Sutherland Stat. Const.* § 49.04 (5th ed. 1992) ("[L]egislative history in the form of information as to how draftsmen of a provision understood it and that their meaning was communicated to the Congress which enacted it has been held to be entitled to greater weight than subsequent administrative interpretation.").

The legislative history of Section 92, while sparse, is clear and compelling that the "in addition to" language must be given precisely the opposite reading from that proffered by the NationsBank Petitioners and their *amici*.

In June of 1916, while the Senate was considering a banking bill previously passed by the House, Comptroller of the Currency Williams wrote to the chairmen of the Senate and House banking committees enclosing draft legislation that would grant insurance agency powers to national banks located in towns with a population of 3,000 or less. 53 Cong. Rec. 11,001 (1916); App. 1a-5a. In explaining the need for such legislation, the Comptroller told the Congress that under existing laws (specifically referring to the incidental powers provision), "[n]ational banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies . . . . It is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." App. at 3a.[7]

[7] Earlier in 1916 the Federal Reserve Board had published a memorandum regarding the authority of national banks to engage in insurance agency activities. 2 Fed. Res. Bull. 73-74 (Feb. 1916). That memorandum likewise concluded that a national bank had no

The Comptroller explained that he had been giving consideration to how small national banks might better compete with state banks and trust companies, which are sometimes authorized to do "a class of business not strictly that of commercial banking." App. at 2a. In discussing the reasons for limiting the grant of such authority to banks in small communities, he concluded that:

> I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers. I think it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores. The business is one requiring training, skill, and application, and I think that the profession of banking would suffer if there should be a departure from the principles which should govern and have heretofore governed.

App. at 4a.

After receiving the letter, Senator Owen, the chairman of the Senate Banking Committee, indicated that he would offer the amendment recommended by Comptroller Williams, which he described as "giving some additional powers to the small banks to act as agents in insurance matters." 53 Cong. Rec. 11,153 (1916). Chairman Owen later introduced the language of the amendment, which he described to his colleagues as having been "reported upon favorably by the Comptroller of the Currency, giving certain limited rights of agency to national banks." *Id.* He noted that while the Comptroller had recommended limiting the provision to communities with a population of 3,000 or less, he was amenable to increasing the popula-

express power to engage in such activities and that no such authority could be derived from the incidental powers of national banks under 12 U.S.C. § 24 Seventh. According to the memorandum, "[a]ny such extension of the powers of national banks must be left to the considerations of Congress." 2 Fed. Res. Bull. at 74.

tion limit to 5,000. The amendment, as modified, was then adopted by the Senate and subsequently incorporated without change into the conference committee report on the overall bill.[8]

Thus, the Comptroller who drafted Section 92 and upon whose recommendation the provision was enacted was clear and unequivocal in his views that (a) national banks had neither the express nor the incidental power to engage in the business of being an insurance agent, (b) the Comptroller "has no right to authorize or permit a national bank to exercise powers not conferred upon it by law," App. at 3a, and (c) it would be "unwise and therefore undesirable" to confer insurance agency powers on national banks generally. App. at 4a.[9] Moreover, there is not a scintilla of evidence that anyone in Congress disagreed with these views. What, then, did Comptroller Williams—and the Congress—intend by the introductory language to Section 92?

The one intention that cannot be attributed to them is to preserve some purported insurance agency powers of national banks under Section 24 Seventh. In light of the Comptroller's letter to Congress, it is totally unreasonable, indeed absurd, to read the "in addition to" language as

[8] *Id.* at 13,259-61 (Senate); *id.* at 13,354-56 (House). There was no further discussion of the insurance provision in the Senate or House.

[9] The fact that, in the 50 years between the enactment of Section 24 Seventh and the enactment of Section 92, the Comptroller had never concluded that the incidental powers provision constituted a congressional grant of insurance agency authority to national banks should be significant in determining whether such power was actually conferred by Section 24 Seventh. *See BankAmerica Corp. v. United States*, 462 U.S. 122, 131 (1983) (quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941)) ("just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred").

reflecting Comptroller Williams'—or the Congress'—intention to preserve incidental powers for national banks that the Comptroller had so clearly concluded did not exist.

Similarly, there is no basis for reading the "in addition to" language as having been intended to preserve insurance agency powers that future Comptrollers of the Currency might authorize. Any such intent is clearly belied by Comptroller Williams' view that the Comptroller had no authority under Section 24 Seventh to authorize insurance agency activities under that section. More importantly, the relevant language of Section 92 is "[i]n addition to the powers *now* vested by law" in national banks (emphasis supplied). "Now" was September 17, 1916, the date of enactment of Section 92. It is indisputable that the Comptroller who drafted this language, and the Congress that enacted it, believed that in 1916 national banks were "*then*" not vested by law with any power to act as insurance agents. Thus, the inclusion of the word "now" absolutely forecloses any argument that it was the intent of Congress, in enacting this language, to preserve the grant of insurance agency powers by future Comptrollers under Section 24 Seventh.

In light of the legislative history, the only possible interpretation of the "in addition to the powers now vested by law" language is that the Comptroller and the Congress were intending to make clear that the limited insurance agency powers granted by Section 92 were the sole insurance agency powers authorized for national banks. Indeed, the "in addition to" language supplies compelling support for the application of the "*expressio unius*" principle by the Fifth Circuit below and by the Second Circuit in *ALTA v. Clarke*.[10]

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[10] "*Expressio unius est exclusio alterius*" is a maxim of statutory construction that is translated as "the mention of one thing implies the exclusion of another." *See VALIC*, 998 F.2d at 1298.

In the *VALIC* and *ALTA v. Clarke* decisions, the courts applied the *expressio unius* principle to hold that the explicit and limited grant of insurance agency powers under Section 92 precluded subsequent administrative determinations of insurance agency powers under Section 24 Seventh. This was a proper application of the principle because it was based on, and totally consistent with, extrinsic evidence of the intent of the drafters of Section 92.

In sum, Congress demarcated the insurance agency powers of national banks in 1916 and any expansion or modification of those powers must come from Congress.

II. PETITIONERS' VIEW OF THE "INCIDENTAL" POWERS OF NATIONAL BANKS IS ERRONEOUS

Since 1864 the National Bank Act, 12 U.S.C. § 24 Seventh, has provided that a national bank may exercise "all such incidental powers as shall be necessary to carry on the business of banking." Petitioners seek to present the Court with a choice between two possible interpretations of the provision. Either the provision conveys a broad grant of authority with the attendant broad delegation of administrative discretion to the Comptroller (as petitioners contend), or the provision represents a static grant of powers that is unable to keep pace with the changing demands and the increased sophistication of the business of banking.[11]

In fact, neither alternative is consistent with the principles derived from Supreme Court and federal appellate court jurisprudence on the incidental powers of national banks. As this jurisprudence demonstrates, the incidental powers provision does not mean that national banks are limited only to those activities that characterized the business of banking as it existed in the nineteenth century. Nor, however, does it mean that national banks have the authority (in the absence of an express statutory grant) to engage in any commercial or business activity that the Comptroller believes has some nexus to banking or to an express power of banks.

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[11] *See, e.g.*, Federal Petitioners Br. at 16-20; NationsBank Petitioners Br. at 26-30.

Between these two extremes, there is an intermediate view of the incidental powers provision—one that explains and harmonizes the judicial precedent in this area and is consistent with a safe and modern banking system.[12] A review of that precedent demonstrates that the courts have upheld activities as "incidental" to "the business of banking" when the activity (1) is a form of, or functionally equivalent to, deposit taking, credit granting, or credit exchanging activities (*i.e.*, activities that constitute the "business of banking,") or is reasonably necessary to enable banks to perform those activities more efficiently or effectively, and (2) does not expose banks to risks of a non-banking nature, such as those of a commercial business enterprise.

From the time of the enactment of the National Bank Act, Supreme Court decisions have upheld activities of national banks as within their incidental powers when such activities fell within these "business of banking" standards. These decisions include:

- *Merchants' Nat'l Bank* v. *State Bank*, 77 U.S. (10 Wall.) 604, 647 (1871) (power to certify checks; functionally equivalent to accepting checks);
- *First Nat'l Bank v. National Exch. Bank*, 92 U.S. 122, 127-28 (1876) (power to acquire stock in compromise of debt owed to the bank as reasonably necessary to effectuate power to make loans; but bank may not engage in business of buying or selling stocks for profit);
- *Union National Bank v. Matthews*, 98 U.S. 621 (1879) (power to foreclose on a deed of trust given

[12] The analysis that follows is derived in substantial measure from Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676 (1983). Remarkably, petitioners and all of their *amici* cite Professor Symons' article for other propositions, but fail to draw the Court's attention to the fundamental insights Professor Symons derives from the relevant jurisprudence regarding the proper interpretation of the incidental powers clause.

by a third party and pledged to bank to secure a loan from the bank);

- *Wyman v. Wallace*, 201 U.S. 230, 243 (1906) (power to borrow money to repay depositors: "[The bank] is not borrowing money to engage in new business. It simply exchanges one creditor for others");
- *Miller v. King*, 223 U.S. 505, 510 (1912) (power to act as trustee for collection of a debt and to sue for recovery of that debt; such activity being functionally equivalent to a bank's traditional business of taking title to a negotiable instrument endorsed to it for purposes of collection);
- *Clement Nat'l Bank v. Vermont*, 231 U.S. 120, 139-40 (1913) (power to execute agreement with state to implement state law permitting banks, on behalf of their depositors, to pay tax imposed on the interest paid on such deposits; agreement was directly related to the business of deposit taking);
- *First Nat'l Bank v. Hartford*, 273 U.S. 548, 559-60 (1927) (power to sell mortgages and other debt instruments acquired by loan or discount);
- *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41, 49 (1940) (power to conduct a safe deposit business; functionally equivalent to express power under 12 U.S.C. § 133 to accept special deposits); and
- *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377-78 (1954) (power to use the word "savings" in advertising the bank's authorized business).

Recent decisions of federal appellate courts upholding activities of national banks as within their incidental powers likewise reflect the above-described "business of banking" standards. *See, e.g., First Nat'l Bank v. Taylor*, 907 F.2d 775 (8th Cir.) (power to issue debt cancellation contracts to borrowers under which the borrower's debt is extinguished in the event of death), *cert. denied*, 498 U.S. 972 (1990); *Securities Indus. Ass'n v. Clarke*,

885 F.2d 1034 (2d Cir. 1989) (power to sell mortgage pass-through certificates as a mechanism for the sale of the bank's mortgage loans), *cert. denied*, 493 U.S. 1070 (1990); *American Ins. Ass'n v. Clarke*, 865 F.2d 278, 282 (D.C. Cir. 1989) (upholding the issuance of standby credits to insure municipal bonds as essentially constituting "the issuance of a standby letter of credit, a device long recognized as within the business of banking"); *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1380 (9th Cir. 1977) (authorizing bank to engage in the leasing of personal property "when, in the light of all relevant circumstances, the transactions constitute the loan of money secured by the properties leased"), *cert. denied*, 436 U.S. 956 (1978).

On the other hand, the courts have repeatedly rejected activities as not being incidental to banking where the activity did not fall within the "business of banking" standards identified above or otherwise exposed the bank to risks beyond those entailed in its deposit taking, credit granting, and credit exchanging activities. *See, e.g., Merchants' Nat'l Bank v. Wehrmann*, 202 U.S. 295 (1906) (denying power of bank to become a partner in a business that would expose it to unlimited liability); *First Nat'l Bank v. Converse*, 200 U.S. 425 (1906) (denying power to become an organizer and stockholder in a new venture even if the bank had previously lent money to a predecessor company); *California Nat'l Bank v. Kennedy*, 167 U.S. 362 (1897) (denying power to acquire stock in another corporation except as security for or in compromise of a debt); *M & M Leasing Corp.*, 563 F.2d at 1383-84 (denying power to engage in automobile lease transactions that would involve the bank in more than traditional credit risk exposure, or to provide "operational services such as repairs, maintenance, spare parts, *insurance coverage*, license renewals . . . [because] such services are not those of a bank") (emphasis added) (footnote omitted); *National Retailers Corp. v. Valley Nat'l Bank*, 604 F.2d 32 (9th Cir. 1979) (*per curiam*)

(denying power to offer data processing services to parties other than the bank itself); *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972) (denying power to operate a travel agency).

In an attempt to sidestep this historical framework, petitioners misconstrue the "convenient or useful" standard first articulated in *Arnold Tours*, 472 F.2d at 432 (an activity is incidental if it is "convenient or useful" in connection with the performance of an express power). The "convenient or useful" language used by the First Circuit was intended to summarize in a few words the principles to be derived from its analysis of the prior Supreme Court and lower court jurisprudence discussed above. *Id.* at 431-32. The principles the *Arnold Tours* court sought to encapsulize in the "convenient or useful" standard are the same principles that have been identified in Professor Symons' article, and that ALTA believes should be applied by this Court.

Stripped from the context in which it must be viewed—the historical jurisprudence on the activities of national banks—the phrase "convenient or useful" can easily be misunderstood as sanctioning any commercial or business activity that has some nexus of "convenience" or "usefulness" to banking or a bank's express powers. Judicial decisions that have applied the "convenient or useful" standard have not, in fact, sanctioned such broad-ranging activities.[13] Rather, consistent with Professor Symons' analysis they have not permitted banks to engage in new business activities unless the activity was functionally equivalent to or involved the same risks as deposit taking, credit granting, or credit exchanging, or was reasonably necessary to enable those powers to be exercised effectively. This analysis of the incidental powers provision is faithful to the principle that new substantive powers

[13] *See, e.g., Securities Indus. Ass'n v. Clarke*, 885 F.2d 1034; *American Ins. Ass'n v. Clarke*, 865 F.2d 278; *National Retailers Corp.*, 604 F.2d 32; *M & M Leasing Corp.*, 563 F.2d 1377.

for national banks should be established by Congress and provides a reasoned, consistent approach to "permit[ting] the use of new ways of conducting the very old business of banking." *M & M Leasing Corp.*, 563 F.2d at 1382. It is the analysis that should guide this Court's resolution of the incidental powers issue.

III. AFFIRMANCE OF THE DECISION BELOW WILL NOT JEOPARDIZE THE ABILITY OF NATIONAL BANKS TO CONTINUE TO ENGAGE IN CREDIT-RELATED INSURANCE ACTIVITIES THAT HAVE BEEN UPHELD BY THE COURTS

Petitioners' *amici* point out that for many years national banks have engaged in the sale of certain credit-related products (most prominently credit life and credit disability insurance) that are generally considered to be insurance and that the sale of such products has been upheld by the courts.[14] The implication is that a decision by the Court that Section 92 restricts the authority of national banks to act as insurance agents in places with a population in excess of 5,000 may jeopardize the continued ability of national banks to engage in these activities.[15]

The nub of the issue is how to reconcile the conclusion of the D.C. Circuit in *Heimann*, that Section 92 does not limit the sale of credit life insurance by national banks, with the conclusions in the Fifth Circuit's decisions in *VALIC* and *Saxon*, and in the Second Circuit's decision in *ALTA v. Clarke*—that Section 92 limits the powers of national banks to sell annuities, and to act as agents

[14] New York Clearing House Association Br. at 2-3; ABA Br. at 14.

[15] This concern was highlighted by the NationsBank Petitioners. *See* NationsBank Petition for Writ of Certiorari at 27 ("If the expansive and unsupportable interpretation given *Saxon* by the court of appeals stands, then all of the national bank insurance activities regarding the specialized insurance-related products discussed above would be subject to challenge.").

in the sale of property and casualty insurance, and title insurance. While credit life insurance is not at issue in this case, the Court should appreciate why a decision affirming the conclusions reached by the Fifth and Second Circuits regarding the scope and meaning of Section 92 would not necessarily have to apply to the credit-related insurance activities that were approved in *Heimann*.[16]

The *Heimann* decision involved regulations promulgated by the Comptroller to curb self-dealing by bank insiders who were personally profiting from the sale of credit life insurance to bank customers and to permit the banks themselves to obtain commissions from the sale of such insurance[17] In promulgating these regulations, the Comptroller identified certain salient characteristics of credit life insurance and national bank involvement in the sale of credit life insurance that had led him to approve the activity for all national banks.[18] These factors included:

- credit life insurance is issued only in connection with credit transactions, exists solely for the pro-

[16] The alleged conflict between the Second Circuit's decision on title insurance and the *Heimann* decision on credit life insurance was also a principal ground on which the Federal Petitioners and Chase Manhattan had sought review in the ALTA case. In opposing the petitions for writs of certiorari, ALTA addressed at length the unique factors regarding bank involvement in the sale of credit life insurance that are discussed below and the reasons why such factors were completely inapposite in the context of title insurance. *See* Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 11-16, Nos. 92-482, 92-645 (filed Nov. 12, 1992).

[17] These regulations are presently codified at 12 C.F.R. §§ 2.1-2.7 (1994). The regulations define "credit life insurance" as including "credit life, health, and accident insurance." 12 C.F.R. § 2.3 (1994).

[18] The rulemaking notices in which these factors were discussed are *Disposition of Credit Life Insurance Income* (Final Regulation), 42 Fed. Reg. 48,518 (1977) (hereafter "Final Rulemaking") and *Disposition of Credit Life Insurance Income* (Proposed Rulemaking), 41 Fed. Reg. 29,846 (1976) (hereafter "Proposed Rulemaking").

tection of credit grantors, and "has no appeal whatsoever to persons not simultaneously borrowing from the bank;" [19]

- credit life insurance is the functional substitute for provisions that might otherwise be included in the loan agreement to provide additional security to the lender for the repayment of the loan; [20]
- credit life insurance would not be available for the protection of creditors unless credit grantors, such as national banks, sold the insurance; [21]
- national banks were almost universally involved in the sale of credit life insurance at the time of the Comptroller's credit life rulemaking; [22] and
- unlike the work performed by agents for other types of insurance, a bank that sells credit life insurance performs only *de minimis* clerical work in enrolling borrowers in the credit life program.[23]

[19] Final Rulemaking, 42 Fed. Reg. at 48,518 col. 3.

[20] *See* Final Rulemaking, 42 Fed. Reg. at 48,518 col. 2 (Section 92 was not intended to limit the ability of national banks "to provide, in connection with a credit transaction, a peculiarly special type of insurance which could serve the same purpose as additional collateral, a co-maker, or a guarantor.").

[21] *See* Final Rulemaking, 42 Fed. Reg. at 48,518 col. 2 (credit life insurance is "peculiarly related to the business of banking and not generally available from insurance agencies unaffiliated with financial institutions"); *id.* at col. 3 n.3 ("Congress recognized that creditors are virtually the only source of credit life insurance").

[22] *See* Proposed Rulemaking, 41 Fed. Reg. at 29,847 col. 1 (Comptroller's conclusion influenced by the widespread availability of credit life insurance at commercial banks throughout the United States) & n.1 thereto (survey by national bank examiners of 2,900 national banks indicated that fewer than 20 were *not* providing credit life insurance) (emphasis supplied).

[23] *See* Final Rulemaking, 42 Fed. Reg. at 48,518 col. 3 (banks engaged in selling credit life insurance do not engage in risk investigation or evaluation or other functions typically performed by an independent insurance agent); *id.* at 48,521 col. 3 ("the

In light of these factors, it is understandable why the D.C. Circuit concluded that credit life insurance is "[u]nlike other forms of insurance" and is a "limited special type of coverage written to protect loans," *Heimann*, 613 F.2d at 1170. They also explain why the Second Circuit concluded that its determination on title insurance was not inconsistent with the D.C. Circuit's conclusions regarding the credit life insurance powers of national banks. *See ALTA v. Clarke*, 968 F.2d at 270.

While these factors characterize credit life insurance and the other types of credit-related insurance, they do not pertain in any way to the types of insurance activities that were at issue in *Saxon* (homeowners and automobile insurance), in *ALTA v. Clarke* (title insurance), or to the sale of annuities.

In sum, the lower courts have appropriately recognized that national bank sale of credit-related insurance should be differentiated from the sale by national banks of other kinds of insurance products, such as automobile, homeowners, and title insurance. ALTA believes that the court below properly concluded that the sale of annuities is embraced within the limitations of Section 92. If, however, the Court should reach a contrary conclusion, we urge it to be mindful of the careful and proper balance that the lower courts have struck with regard to the various types of insurance and to avoid inadvertently upsetting

administrative cost of producing credit life insurance income is close to negligible"). *See also Commissioner v. First Sec. Bank*, 405 U.S. 394, 397 (1972) ("The cost to each of the Banks for the actual time devoted to explaining and processing the [credit life] insurance was less than $2,000 per year, characterized by the courts below as 'negligible.'").

Indeed, one could well conclude that the ministerial role a bank plays in the sale of credit life insurance should not be considered to be that of an insurance agent within the meaning of Section 92. *See First Nat'l Bank v. Smith*, 436 F. Supp. 824, 831-33 (S.D. Tex. 1977), *modified*, 610 F.2d 1258, 1262 (5th Cir. 1980) (discussion of Section 92 vacated as unnecessary to resolution of case).

that balance through language in its opinion that might suggest a broader ruling than the Court intends. Just as petitioners' *amici* are concerned that a decision upholding the court below not cast doubt on the continued power of national banks to sell credit-related insurance, ALTA is concerned that a decision reversing the court below not inadvertently cast doubt on the Second Circuit's determination regarding title insurance.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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September 8, 1994

APPENDIX

APPENDIX

LETTER FROM COMPTROLLER WILLIAMS
53 Cong. Rec. 11,001 (1916)

Treasury Department,
Comptroller of The Currency,
Washington, June 8, 1916.

My Dear Senator:

The original national-bank act of February 25, 1863, as reenacted by the act of June 3, 1864, authorizing the formation of national banks throughout the country, provided that no national bank should be authorized with a capital of less than $50,000 in any place; that in a place with a population exceeding 6,000 the capital of the bank should not be less than $100,000, and further provided that no national bank with a capital of less than $200,000 should be organized in any place having a population of over 50,000.

Later on it became manifest that there were many country towns and villages which needed banking facilities but which did not have sufficient business to justify the organization of national banks with a capital of as much as $50,000. To extend the benefits of banking facilities to these small places the national-bank act was amended by the act of March 14, 1900, so as to authorize the organization in towns and villages with a population not exceeding 3,000 of banks with a minimum capital of $25,000.

Since this amendment to the bank act went into effect there have been organized throughout the country 3,084 national banks having a capital of $25,000. Four hundred and thirty-eight of these $25,000 banks have either failed or gone into liquidation, some have increased their capital, and the number of such banks with a capital of $25,000 now in operation is 2,079, or 27 per cent of the total number of national banks.

The average deposits (individual and bank) at this time of all $25,000 banks is $178,138, or 7.13 times their capital and 4.6 times their capital, surplus, and profits. A country bank with $25,000 capital and with the average deposits is able, with good management, to lend its money at rates authorized by law and at the same time to return a reasonable dividend to its shareholders. But there are many banks located in country communities where the small deposits which the banks receive may make it somewhat difficult for the banks to charge on their loans only the rates of interest permitted by law and at the same time yield a satisfactory return to shareholders, and in many such cases banks have been tempted to exact excessive and in some cases grossly usurious rates on accommodations which they extend to local borrowers. It is unfortunately true that in many other cases banks have been demanding usurious rates of interest even though they had more than the average deposits and although adherence to the legal rates would still yield them liberal dividends on their shares.

For some time I have been giving careful consideration to the question as to how the powers of these small national banks might be enlarged so as to provide them with additional sources of revenue and place them in a position where they could better compete with local State banks and trust companies which are sometimes authorized under the law to do a class of business not strictly that of commercial banking.

Under Section 5736, United States Revised Statutes, the business of national banks at this time is limited to the exercise of "such incidental powers as shall be necessary to carry on the business of banking by (a) discounting and negotiating promissory notes, drafts, bills of exchange or other evidences of debt; (b) receiving deposits; (c) buying and selling exchange, coin, and bullion; (d) loaning money on personal security; (e) obtaining, issuing, and circulating notes according to the provisions of this title."

Under the Federal reserve act the banks are further authorized under specified restrictions to make certain loans on real estate.

National banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies or as brokers or agents for others in procuring or making real estate loans.

The courts have uniformly held that such corporations can exercise only those powers which are expressly granted or which are necessarily incidental to powers that are granted.

As stated by Mr. Justice Harlan, in delivering the opinion of the United States Supreme Court in the case of Logan County National Bank v. Townsend (139 U.S., 67):

"It is undoubtedly true, as contended by the defendant, that the national banking act is an enabling act for all associations organized under it, and that a national bank can not rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

Again in the case of National Bank v. Matthews (98 U.S., 625), Mr. Justice Swan, in delivering the opinion of the court, said:

"Section 5136 does not in terms prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed."

It is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law.

My investigations lead me respectfully to recommend to Congress an amendment to the national-bank act by which national banks located in villages and towns hav-

ing a population of not exceeding 3,000 may be permitted to act as agents for insurance companies in the placing of policies of insurance—fire, life, etc.—and that they may also be authorized to act as agents for the negotiation of loans on farms or other real estate in their respective sections of the country, where they may be in position to have some direct knowledge as to the value of the property upon which such loans are to be secured.

It seems desirable from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities. This additional income will strengthen them and increase their ability to make a fair return to their shareholders, while the new business is not likely to assume such proportions as to distract the officers of the bank from the principal business of banking. Furthermore in many small places the amount of insurance policies written or mortgages to be placed on commission is not sufficient to take up the entire time of an insurance broker, and the bank is not therefore likely to trespass upon outside business naturally belonging to others.

I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking affords ample scope for the energies of trained and expert bankers. I think it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores. The business is one requiring training, skill, and application, and I think that the profession of banking would suffer if there should be a departure from the principles which should govern and have heretofore governed.

I inclose with this a draft of a proposed amendment to the national-banking act designed to empower national banks located in towns of not over 3,000 population, under such regulations and restrictions as may from time to time be approved and promulgated by the Comptroller

of the Currency, to act as agents for the placing of insurance policies and also to act as agent in making or procuring loans on real estate.

I respectfully recommend and urge the adoption of such an amendment for the reasons I have given.

I am to-day writing a letter similar to this to Congressman Glass, chairman of the Banking and Currency Committee of the House of Representatives.

Respectfully,

Jno. Skelton Williams,
Comptroller.

Hon. Robert L. Owen,
United States Senate.